Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DARYL GATES, et al.,
Petitioners,
vs.
DOLORES LANGFORD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

JOAN W. HOWARTH
Counsel of Record
MARK D. ROSENBAUM
PAUL L. HOFFMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720
Counsel for Respondents

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

27pp

QUESTION PRESENTED

Whether the reasonably foreseeable risk of serious injury from driving a fourteen foot steel battering ram mounted on a military tank through a wall into the interior of an occupied residence requires police to obtain specific judicial authorization for that method of entry prior to using it to execute a warrant.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

REASONS WHY THE PETITION SHOULD BE DENIED 9

1. The California Supreme Court's Decision Rests Upon Independent and Adequate State Grounds 9

2. The Injunction Was Granted Below As A State Taxpayer Action That Does Not Present A Case Or Controversy As Required For Federal Court Jurisdiction . . . 13

3. The Requirement of Prior Judicial Authorization Is The Established Solution For Unusually Dangerous Search Techniques 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases — Page(s)

Amalgamated Food Employees Union v. Logan Valley Plaza
391 U.S. 308 (1968) 12

Blair v. Pitchess
5 Cal.3d 258 (1971) 15

City of Los Angeles v. Lyons
461 U.S. 95 (1983) 13, 14

Dalia v. United States
441 U.S. 238 (1979) 12, 21

Doremus v. Board of Education
342 U.S. 429 (1952) 14, 15

Flast v. Cohen
392 U.S. 83 (1968) 14

Johnson v. United States
333 U.S. 10 (1948) 12

Langford v. Gates
610 F.Supp. 120 (C.D. Cal. 1985) 2,15,16

Langford v. Superior Court, 43 Cal.3d 21, 233 Cal.Rptr. 387 (1987) . . . . passim

Michigan v. Long
463 U.S. 1032 (1983) 2,9,13

Musser v. Sheppard
299 U.S. 513 (1936). 12

Organization for a Better Austin v. Keefe
402 U.S. 415 (1971) 12

Parsley v. Superior Court
9 Cal.3d 934 (1973) 10

People v. Dumas
9 Cal.3d 871 (1973) 10

People v. Gastelo
67 Cal.2d 586 (1967). 11

People v. Scott
21 Cal. 3d 284 (1978) 17

People v. Vollheim
87 Cal.App.3d 538 (1978). 11

Van Atta v. Scott
27 Cal.3d 424 (1980) 15

White v. Davis
13 Cal. 3d 757 (1975) 14, 15

Williams v. Quill
303 U.S. 621 (1938) 12

Winston v. Lee
470 U.S. 753 (1985) 17

Wirin v. Parker
48 Cal.2d 890 (1957) 15

Statutes

28 U.S.C. § 1257 . . . . . 2, 11

California Code of Civil Procedure
§ 526a 11

California Penal Code
§ 1531 10
§ 1533 10

NO. 86-1932

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DARYL GATES, et al.,

Petitioners,

vs.

DOLORES LANGFORD, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Dolores Langford, et al., respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Petitioners seek review of the California Supreme Court's opinion in this case, which is reported as Langford

v. Superior Court, 43 Cal.3d 21, 233 Cal.Rptr. 387 (1987). A copy of that opinion is attached to the petition as Appendix A, 1a-34a. Another lower court decision in this case relevant to the petition is Langford v. Gates, reported at 610 F.Supp. 120 (C.D. Cal. 1985).

JURISDICTION

Jurisdiction is not proper for three separate reasons. First, the opinion below rests upon independent and adequate state grounds. See Michigan v. Long, 463 U.S. 1032, 1038-1044 (1983). Second, the "final judgment" requirement of 28 U.S.C. § 1257 has not been met in that the opinion below resulted simply in provisional relief, a preliminary injunction. Finally, this California taxpayer action does not satisfy the threshold case or controversy requirement for federal court

jurisdiction of Article III of the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, section 2 in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more states;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress

shall make.

California Constitution, Art. I, § 13: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

California Code of Civil Procedure, § 526a:

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officers thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for improvements or public utilities.

An action brought pursuant to this section to enjoin a public improve-

ment project shall take special precedence over all civil matters on the calendar is granted by law.

California Penal Code, § 1531:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

California Penal Code § 1533:

Upon a showing of good cause, the magistrate may, in his discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 o'clock a.m. and 10 o'clock p.m.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the case and facts as set forth in the California Supreme Court opinion, with the following additions.

Three of the plaintiffs in this action, Dolores Langford and her sons Eddie, then

four, and Dyvon, then nine, were visiting at the home of a neighborhood friend when that house became the first target of the Los Angeles Police Department's "motorized battering ram." The "motorized battering ram" is a surplus military armored personnel carrier, or tank, specially equipped by petitioners with a fourteen-foot steel battering ram fronted by a rectangular steel plate.

Petitioners used the tank-driven battering ram for the first time on February 6, 1985 at 7:30 p.m. The ram ripped through a room where Eddie, Dyvon, and another child, age five, had been playing until 7:25, when their mothers had called them into the kitchen for ice cream.[1]

---

[1] The record before the California Supreme Court contained substantial documentation of this event, including a KCBS videotape of the entry (Ex. A to the

Although petitioners continue to describe that home as a fortified rock house (e.g., Pet. 3), no weapons were in the home and no criminal charges were filed as a result of that raid. The "fortifications" on the house, bars on the windows and a heavily screened front door and porch, were on the home at the time that the tenants moved in. See Declaration of Linda Johnson, in Ex. 3 to Pet. for Writ of Mandate. Although the basis for the search warrant was an informant's report that he had bought $50.00 worth of cocaine from an adult Black male in that location, there were

---

Motion for a Prelim. Inj.), Los Angeles Times photographs of the tank-driven battering ram (Ex. M & N), photographs of the damage to the house (Ex. C through L), and declarations (within Ex. 3 to Pet. for Writ of Mandate) from Dolores Langford, her son Dyvon, and Linda Johnson, the other adult occupant of the home.

no males over the age of nine in the home at the time that the tank-driven battering ram was used. See Motion for Prelim. Inj. at 7-10, Ex. 2 to Pet. for Writ of Mandate.

Although petitioners submitted affidavits that the driver was trained not to exceed five miles per hour when driving into the house, the videotape of the battering ram indicates that the tank accelerated well beyond that limit at the moment of impact. See Exh. A to Motion for Prelim. Inj., in Ex. 4 to Pet. for Writ of Mandate.

The record below demonstrates that petitioners presented no method to avoid hitting anyone inside the home who happened to be in the path of the battering ram. See Ex. 7 to Pet. for Writ of Mandate at 9-11. To the contrary, petitioners acknowledged that "the

use of force directed against a building will always create some risk that a person inside may suffer injury because of where he or she happens to be...." Defendant's Opp. to Motion for Prelim. Inj. at 37, Ex. 5 to Pet. for Writ of Mandate.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The California Supreme Court's Decision Rests Upon Independent and Adequate State Grounds.

Petitioners' contention that the opinion below does not rest upon independent and adequate state grounds under the rule of Michigan v. Long, supra, 463 U.S. at 1041-1044 is incorrect. Petitioners describe as "oblique" (Pet. 5 n.1) what was in fact the specific holding of the court below -- set forth clearly at the very outset of the opinion:

> The unregulated use of the motorized battering ram, but not the flash-bangs, poses a significant and unusual threat to property and public safety that may, unless subject to judicial scrutiny, contravene the proscription against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution.

Langford v. Superior Court, Pet. App. 1a (emphasis added).

The explicit reliance upon the California Constitution in the holding of the opinion is followed and built upon by extensive analysis of California law. Petitioners' jurisdictional argument (Pet. 5 n.1) omits any reference to the California statutes (including California Penal Code § 1533 restricting nighttime service and § 1531 controlling knock and notice) and most of the case authority (including Parsley v. Superior Court (1973) 9 Cal.3d 934, People v. Dumas

(1973) 9 Cal.3d 871, People v. Gastelo (1967) 67 Cal.2d 586 and People v. Vollheim (1978) 87 Cal.App.3d 538) used by the court below as the search and seizure jurisprudence forming the basis for its opinion. See Pet. App. 9a-12a.

Further, the decision below rests on California civil procedure regarding the availability of provisional injunctive relief generally (App. 6a-7a) and specifically pursuant to California Code of Civil Procedure § 526a, which provides standing for taxpayers to enjoin illegal use of funds. Pet. App. 7a, 14a.[2]

---

[2]Lack of Article III jurisdiction because of the taxpayer standing for this injunction is discussed infra at 12-15.

In addition, the fact that the opinion below reversed the denial of a preliminary injunction means that the instant case does not present a "final judgment" as required for this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257. An order granting a preliminary injunction is not deemed final unless the injunction concludes the case. E.g.,

Petitioners are correct that two federal cases, Johnson v. United States, 333 U.S. 10 (1948) and Dalia v. United States, 441 U.S. 238 (1979), were cited in the opinion. However, Johnson v. United States, supra, was simply the source of Justice Jackson's classic phrase "officer engaged in the often competitive enterprise of ferreting out crime." Pet. App. 9a. Dalia v. United States, supra, although vigorously urged upon the California court (and now this Court) by petitioners, was discussed and found not to apply. Pet. App. 9a-10a.

As is clear from the opinion below, the

Musser v. Sheppard, 299 U.S. 513 (1936); Williams v. Quill, 303 U.S. 621 (1938). The limited exceptions to this rule (see, e.g. Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 n. (1971); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 312-313 n.5 (1968) were based on a heightened concern for irreclaimable First Amendment rights not present here.

preliminary injunction ordered as a result of this California Supreme Court opinion would be precisely the same even if based solely on California law. In short, a grant of certiorari in this case would push this Court's certiorari jurisdiction well beyond the limits of Michigan v. Long, supra, and needlessly entangle this Court in questions of California search and seizure jurisprudence and civil procedure for the purpose of creating what would be simply an advisory opinion.

2. The Injunction Was Granted Below As A State Taxpayer Action That Does Not Present A Case Or Controversy As Required For Federal Court Jurisdiction.

This Court has no jurisdiction over this matter because it does not meet the "threshold" case or controversy requirement, City of Los Angeles v. Lyons, 461

U.S. 95, 101 (1983), of Article III of the United States Constitution. The California Supreme Court granted plaintiffs injunctive relief as taxpayers pursuant to California Code of Civil Procedure section 526a, which invites taxpayers to use California courts to prevent or restrain illegal expenditures by governmental entities. Pet. App. 2a, 14a. California Code of Civil Procedure section 526a provides much broader standing in California courts than the relatively strict constraints that Article III imposes on federal courts. Compare White v. Davis, 13 Cal. 3d 757 (1975) with City of Los Angeles v. Lyons, supra, 461 U.S. 95. Under the well-settled authority of Doremus v. Board of Education, 342 U.S. 429, 434-435 (1952), and Flast v. Cohen, 392 U.S. 83, 102-03 (1968), there can be no question that

petitioners are asking this Court to assert jurisdiction over a matter outside the jurisdiction of any federal court.

Not bound by Article III, California courts have accepted the invitation of Doremus v. Board of Education, supra, 342 U.S. at 434, to provide taxpayer standing to redress constitutional violations. The opinion below is simply the latest in a long line of such California taxpayer actions. E.g., Van Atta v. Scott, 27 Cal.3d 424 (1980); White v. Davis, 13 Cal.3d 757 (1975); Blair v. Pitchess, 5 Cal.3d 258 (1971); Wirin v. Parker, 48 Cal.2d 890 (1957).

In fact, in Langford v. Gates, 610 F. Supp. 120 (C.D. Cal. 1985), a federal district court has already recognized that the injunctive claims in this case do not constitute a "case or controversy" within the meaning of Article III. In

the early stages of this litigation petitioners attempted to remove this action to federal court and moved to dismiss the injunctive claims for lack of federal court jurisdiction. See Langford v. Gates, supra, 610 F.Supp. at 121. Petitioners themselves asserted, respondents conceded, and the court held as "undisputed" (id. at 121) that the injunctive claims did not constitute a case or controversy and were therefore not within the jurisdiction of a federal court. Id. at 121-122. Unfortunately for petitioners, the case or controversy limitations of Article III cannot be turned on and off for their convenience. Article III does not permit this Court to take jurisdiction over this case.

3. The Requirement Of Prior Judicial Authorization Is The Established Solution For Unusually Dangerous Search Techniques.

The principle that judicial authorization is required prior to especially risky or intrusive searches is well-established within California and federal search and seizure jurisprudence. See, e.g., Winston v. Lee, 470 U.S. 753 (1985), People v. Scott, 21 Cal. 3d 284 (1978), and California Penal Code, section 1533. The California Supreme Court decision below simply applies this principle to a new set of circumstances, that the Los Angeles Police Department wants to use a dangerous tank-driven battering ram to execute certain search warrants.

The record below demonstrated to the California Supreme Court that the motorized battering ram as used by

petitioners created a "significant and unusual threat to property and public safety." Pet. App. 1a. The California Supreme Court described some of the risks:

> "[Defendants] concede the potential danger from collapse of building walls and ceilings or through rupture of utility lines. Fire from damaged electrical wires or explosion from gas leaking from broken gas pipes could threaten the safety not only of occupants, but of entire neighborhoods." Pet. App. 8a.

The court's recognition of a requirement for prior judicial authorization was based on the record of "reasonably foreseeable" (Pet. App. 9a) risk of "incidental injury to human beings" (id.) from petitioners' use of their tank-driven battering ram. The specific technique at issue--using a military tank to drive a steel pole and plate into the interior of an occupied residence in order to conduct a search -- is sensa-

tional and unprecedented; however, the sensible and well-reasoned judicial authorization limitation imposed by the California Supreme Court is well within the mainstream of search and seizure analysis.

Petitioners' complaint that the requirement of obtaining a warrant prior to using their motorized battering ram will unreasonably inhibit their ability to respond to crime quickly and effectively (Pet. 6-7) was soundly rejected by the Court below on the basis of petitioners' own affidavits. Petitioners submitted detailed affidavits that described a careful, deliberate review process that was conducted within two different divisions and that climbed carefully through the chain of command to

the assistant chief level.[3] On the basis of this record the court below properly and easily concluded:

> "[I]n light of the deliberate, often prolonged, planning that the LAPD undertakes before it deploys the device, prior judicial review of its proposed use of the ram against suspected rock houses is unlikely to obstruct effective law enforcement." Pet. App. 1a-2a (emphasis added).

Petitioners' argument -- that they and other police agencies should have

---

[3] Petitioners submitted affidavits describing a review process that begins with a "careful and detailed study" by narcotics officers, is then reviewed by the "commander of the narcotics division," and then taken to SWAT officers for an independent inspection of all available options. The results of that new study are then scrutinized by the "Captain in charge of SWAT," who then takes them for an independent review by the Commander of the Metropolitan Division, who goes finally to the Assistant Chief for the ultimate decision. See, e.g., Answer to Petition for Writ of Mandate at 19-20, Declarations of Captain Robert Blanchard, Captain John Higgins, Commander George Morrison, and Assistant Chief Marvin Iannone in Opp. to Motion for Prelim. Inj. (Ex. 6 to Pet. for Writ of Mandate).

unfettered discretion to use whatever tactics they choose, however dangerous--finds no support in either California or federal law. Dalia v. United States, supra, 441 U.S. 238, the single case cited to this Court by petitioners to support their position, was correctly distinguished by the court below. Pet. App. 9a-10a. In fact, no court has ever held Dalia to mean what petitioners want it to mean.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

JOAN W. HOWARTH
Counsel of Record
PAUL L. HOFFMAN
MARK ROSENBAUM
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

Counsel for Respondents

June 25, 1987